THE RATE OF EXCHANGE IN THE LAW OF DAMAGES*

Popular interest in the important technical subject of foreign exchange has been greatly stimulated of late by the unprecedented fluctuations of the exchange rates. These changes indicate important economic phenomena and themselves have important consequences in the business world.[1] One natural result has been the creation of a legal problem which has hardly yet been sufficiently considered by the courts to have resulted in a definite set of rules of law on the subject.

To put the problem clearly before us, let us suppose that D in London, accepts a bill of exchange for 7,000 marks, German money, drawn by and payable to P of New York in Leipzig. The bill is dishonored and duly protested, and P sues D in New York. How much can P recover? Not 7,000 marks, for a New York court can award a judgment only in United States currency—dollars. How many dollars can P recover? That depends upon what 7,000 marks, German money, are worth in United States money; and to convert the German money into United States money we must know what rate of exchange to apply, *i. e.*, the rate at *what time.* Shall we apply the rate prevailing (1) on the date the payment should have been made or the cause of action accrued, or (2) on the date the suit was commenced,[2] or (3) on the date the verdict or judgment was entered, or (4) on the date the judgment was paid or execution[3] made thereon?

The above supposititious case is a common one in commercial transactions involving negotiable instruments. The same problem, however, arises in other cases, for instance, in a contract action not involving a negotiable instrument (1) but for a liquidated demand (an obligation to repay a loan of 7,000 marks Germany money), or (2) for an unliquidated demand (a contract for carriage of goods from the United States to Germany), or (3) a tort, involving either liquidated or un-

* The writer is indebted especially to Harlan F. Stone, Dean of the Columbia Law School, for his generosity, patience, and helpfulness, in giving so much time to a discussion of the contents of this article with the writer.

[1] See *Liberty Nat. Bank of New York* v. *Burr* (D. C. 1921) 270 Fed. 251, 255; *Di Ferdinando* v. *Simon, Smis & Co.* (C. of App., July 12, 1920) [1920] 3 K. B. 409, 414, *aff'g* (K. B. D.) [1920] 2 K. B. 704. *Cf. King* v. *Shepherd* (C. C. D. Mass. 1844) Fed. Cas. No. 7,804, (admiralty suit *in personam* for loss by carrier of box of gold sovereigns, alleged to be of the value of $10,000, to be carried from New York to Mobile, but lost in an accident off Key West, where proceedings for salvage were instituted. Judge Story allowed the value of the coins at Key West, rather than at Mobile).

[2] "The suggestion that it might be the date of the writ was incapable of being supported and has not been argued." See *Owners of S. S. Celia* v. *Owners of S. S. Volturno, infra,* footnote 10, p. 548.

[3] See *Burgess* v. *Alliance Insurance Co.* (Mass. 1865) 10 Allen 221, 228.

liquidated items of damage (a collision between two ships, where in one case repairs are made and paid for, thus liquidating one item of damage; or where in another case repairs are not made, so that the total depreciation in value of the ship must be determined at the trial). In all these cases, if P is primarily entitled to recover an amount expressed in foreign currency and suit is brought in the United States, the question arises what rate of exchange shall be applied in determining the amount of the judgment necessarily expressed in United States currency. What date shall we select to determine the rate? Shall it be (1) the date of execution or payment of the judgment, (2) the date of judgment or verdict, (3) the date of commencement of the suit; or if a contract, (4) the date of the obligation to pay a liquidated amount,[4] or (5) the date of breach of contract, or (6) the date the damages are ascertainable where the damages are unliquidated; or if a tort, (7) the date the amount of damages is ascertainable, or (8) the date of the tort?[5]

Aside from the item of rate of exchange, there is general agreement as to the date on which damages due the plaintiff should be ascertained. Thus in the case of breach of contract, or tort, the date of breach or tort (or the date of ascertainment of damages as to any item liquidated before suit) is selected rather than the date of judgment. The only question as to the rate of exchange is what rate should be selected; and while practically all of the above dates have been suggested as possible dates to determine the rate, the courts have given serious consideration only to the date of judgment as against the date of ascertainment of damages. Where the latter date has been selected, the foreign currency has been looked upon just as a commodity, whose value is fixed on the date of breach at an amount which is the same all over the world. Thus if a defendant had breached an obligation to pay 7,000 marks on January 1, 1922, should the plaintiff sue in the United States, he would recover the value of 7,000 marks in dollars on January 1, 1922. Should the plaintiff sue in Italy, he would recover the value of 7,000 marks in lire on January 1, 1922. This would be true whether judgment were rendered on May 1, 1922 or June 1, 1922, irrespective of the rates of exchange on those dates. On the other hand, where the judgment date rule is applied, this is done regardless of the fact that the plaintiff who sued in the United States might be recovering less than if he sued in Italy (assuming the same rule should be applied there), owing to the fact that the rate of exchange between Germany and the United States may have

[4] *Cf. Cowan* v. *McCutchen* (1870) 43 Miss. 207; *Rawlings* v. *Duvall* (Md. 1797) 4 Har. & McH. 1 (lease).

[5] In the Scottish case of *Fergusson & Co.* v. *Brown and Tawse* [1917] 2 S. L. T. 2, 3, the court was of the "present impression . . . that the method adopted by the Lord Ordinary is wrong." He had ruled that on a debt payable in German money in Germany on Aug. 14, 1914, the average exchange value of German money for the first six months of 1914 was to be applied.

fluctuated more than the rate between Germany and Italy in the interval between the time of breach and the time of judgment.

Is the above case which involved an obligation under a bill of exchange calling for payment of 7,000 marks in Germany any different from one which involves an obligation under a contract of sale, made in Germany, to pay 7,000 marks in Germany as the price of the commodity purchased? In both cases the obligor is under a duty to produce marks in Germany. In all essential respects the obligor would have to go through the same practical process in securing the discharge of his obligation. In either case, he might happen to have a credit in marks in a German bank which he could transfer to the obligee in settlement. And in either case, if he had no such credit, he could buy one, by purchasing a bill of exchange, from someone who had, a bank, a foreign exchange dealer, or an exporter of goods to Germany. Yet in the recent case of *Sirie* v. *Godfrey*,[6] the New York Appellate Division for the First Department, in a unanimous decision, expressed the belief that these two cases were fundamentally different. The bill of exchange case involved the "transmission of funds," and if the obligor did not have the marks in Germany on the date required, he was liable in damages at the rate prevailing on the date his obligation was due. But the contract for the sale of goods involved merely the payment of the price in marks for goods sold in Germany—this, evidently thought the court, did not involve the "transmission of funds." Thus if the obligor did not have the marks in Germany on the date required, he was liable for so much U. S. currency as would give the plaintiff the price of the goods, viz: the value of the marks at the rate prevailing at the date of judgment.

It should be noted at once that what the American court is doing in the sale case is giving *damages* for the breach of an obligation to pay or deliver 7,000 marks. The court quite obviously cannot give the plaintiff the *price*, which is expressed in foreign currency. In a contract to sell goods in the United States for an amount expressed in dollars (the price) the seller of goods delivered would recover as damages an amount equal to the amount agreed to be paid,—the price, because that is what the buyer should have paid on the agreed date. It is immaterial here as affecting the amount recovered whether that amount be called damages or the price, though it seems obvious that we are dealing in fact simply with a question of damages for breach of contract. Should the question be regarded as other than one of damages for breach of contract, when the amount agreed to be paid (the price) is expressed in foreign currency? And is that case any different from the case of damages for breach of contract to pay an amount in foreign currency due on an acceptance of a bill of exchange? These two cases are so strikingly similar, and the practice of United States importers in paying

[6] (1921) 196 App. Div. 529, 188 N. Y. Supp. 52; see *infra*, footnote 47.

for goods bought abroad by purchasing bills of exchange so general, that it seems difficult to find any sound basis for the distinction attempted by the New York court. The problem has proved confusing to many other courts, as the examination of the following authorities will show. It is hoped that the consideration of a few fundamental principles and analogous situations in the law may prove helpful in removing some of the difficulties of the rate of exchange problem.

Fortunately, the courts of at least one Anglo-American jurisdiction seem finally to have arrived at some settled answer to this perplexing question. The Court of Appeal in England, in *Di Ferdinando* v. *Simon, Smits & Co.*,[7] a suit for breach of contract of carriage and conversion, laid down the rule that the correct rate to apply was the rate prevailing on the date the breach of contract and conversion took place. The same rule had previously been applied in the King's Bench Division, in a suit against a buyer for failure to take delivery and pay for goods,[8] and in a suit against a seller for failure to deliver goods.[9] And in the last case decided in England on this subject, *Owners of S. S. Celia* v. *Owners of S. S. Volturno*,[10] a tort action in admiralty, the House of Lords denied the validity of the date of trial or judgment test, and applied the date of ascertainment of damage (the last day of the detention period), in awarding damages for detention of a ship as a result of a collision. Some of the majority of the court expressly said that this case was in substance an appeal from the *Di Ferdinando* case, and it was stated that there was no difference in principle between a contract and tort action, even where there were prospective or continuing damages.

---

[7] *Supra*, footnote 1. See comment on this case in (1921) 34 Harvard Law Rev. 422, 435, and in 11 A. L. R. 363. In this case the trial court had fixed the damages as the market value of the goods at the place—Italy—and time—Feb. 10, 1919—set by the contract for delivery; and the amount so fixed was 48,000 Italian lire. The value of the lire had increased since that date.

[8] *Barry* v. *Van den Hurk* [1920] 2 K. B. 709, 712. "The plaintiff, whether he be buyer or seller, may issue his writ immediately the breach of contract takes place; the damages are then crystallized, and they do not change afterwards."

[9] *Lebeaupin* v. *Crispin* [1920] 2 K. B. 714. See comment on this case, (1920) 20 COLUMBIA LAW REV. 914; (1921) 5 Minnesota Law Rev. 146.

[10] (July 28, 1921) [1921] 2 A. C. 544, *aff'g The Volturno* [1920] P. 447, (Ct of Ap., Oct., 1920) [1920] P. 454n. See comment on this case, (1921) 31 Yale Law Journ. 198. It should be noted that there was one dissenting opinion. The owners of the Volturno filed a claim for loss due to the fact that the ship was hired to the Italian government. As a result of her detention for repairs from Dec. 25 to 30, 1917 at Gibraltar, and Jan. 24 to Feb. 18, 1918 at Newport News, deductions had been made by the Italian government of 47,373.32 lire and 257,046.40 lire respectively. The rates applied by the court were those on the last day of each detention period, Dec. 30, 1917 and Feb. 18, 1918 respectively. The selection of these dates by the court can be justified, if at all, only by the argument of convenience, and the fact that probably the rates did not vary much within each detention period. Query, whether under the rule enunciated by the court, the proper rates to select would not be, as to the amount (in lire) due for *each day* under the contract of hire with the Italian government, the rate prevailing on each day respectively of the detention periods. Or perhaps the date on which the sum or sums due under the contract were payable by the Italian government according to the terms of the contract. It should be noted that the court did not apply the date of the collision, Dec. 17, 1917, the date on which the cause of action arose. As to the tort problem, see *infra*, p. 235 and *infra*, footnote 105.

Three shadows, however, exist on what would seem otherwise to be a clear English rule. All three of these appeared before the breach of obligation rule was adopted in the *Di Ferdinando* case and sustained in the *Owners of S. S. Celia* case.

(1) In *Cohn* v. *Boulken*,[11] a suit by an indorsee of a cheque "for 7,680 francs (Paris)" drawn in London on an English bank and apparently payable in England, it was held in the King's Bench Division, that judgment should be entered for 7,680 francs at the rate prevailing on the day of *trial*.[12] It is true that this case differs from the *Di Ferdinando* case in the Court of Appeal on the facts, in that here the action involved the liquidated amount of a negotiable instrument and there, unliquidated damages for breach of contract. But it is submitted that this is really no distinction,[13] and that the reasoning of the *Di Ferdinando* case can lead only to the conclusion that *Cohn* v. *Boulken*, decided in the lower court, is not law and must be regarded as overruled by the higher court.[14]

(2) On the same facts as in the *Barry* case,[15] where the breach day rule was adopted, *i. e.*, in a suit against a buyer for failure to take delivery and pay for goods, Roche, *J.*, in *Kirsch* v. *Allen*,[16] decided in the King's Bench Division, adopted the date of judgment rule. Although Roche, *J.*, did not himself absolutely change his opinion as to this case,[17]

[11] (1920) 36 T. L. R. 767. This case has never been published in the official reports, and was not considered in the House of Lords case, *supra*, footnote 10. See comment on this case in (1920) 20 COLUMBIA LAW REV. 922. *Cf. Fabbri* v. *Kalbfleisch* (1873) 52 N. Y. 28 (contract to pay cost of imported nitrate—defendant charged with currency value of gold expended, at rate prevailing at time of expenditure).

[12] What day this is, is not clear—whether the day when action was commenced, or verdict or judgment entered.

[13] See (1920) 20 COLUMBIA LAW REV. 922, 923. It would be unfortunate if the conclusion were reached that this case is sound on the basis of a distinction between a debt and damages. See *infra*, footnotes 14 and 64. This case goes counter to all the reasoning of the re-exchange doctrine. See *infra*, p. 233.

Such a distinction was urged in *Société des Hotels du Touquet-Paris-Plage* v. *Cumming* [1921] 3 K. B. 459, where it was decided that the breach date rate should be applied to a debt or liquidated sum as well as to a breach of contract for other damages.

[14] Action, *J.*, without giving any consideration to the question, accepted the argument of counsel, who cited Lord Tenterden's decision in *Scott* v. *Bevan* (1831) 2 B. & Ad. 78, and the distinction between a debt and damages for breach of contract attempted in *Lebeaupin* v. *Crispin*, *supra*, footnote 9, p. 724. That distinction rested apparently upon a misinterpretation of the holding in *Scott* v. *Bevan*, which holding was correctly explained in the *Di Ferdinando* case. *Scott* v. *Bevan* was a suit in England on a prior judgment recovered in Jamaica, and the court, in applying the rate of exchange prevailing on the date of judgment, was only referring to the date of the *Jamaica* judgment, not to the date of the English judgment. This case therefore is clearly not an authority for the judgment day rule.

[15] *Supra*, footnote 8.

[16] (1919) 36 T. L. R. 59. See *infra*, footnote 19, as to the reversal of this case on another point. This case was approved in *The Hurona* (D. C. S. D. N. Y. 1920) 268 Fed. 910; see also *infra*, footnote 46.

[17] In the *trial* before Roche, *J.*, of *Di Ferdinando* v. *Simon* [1920] 2 K. B. 704, 708, he says, "he [counsel for defendants] has also pressed on me my own decision in *Kirsch* v. *Allen, Harding & Co.* [1919] W. N. 301; 89 L. J. (K. B.) 265; 25

the case was disapproved in the *Lebeaupin* case,[18] and likewise in the *Di Ferdinando* case in the Court of Appeal. Moreover, the case of *Kirsch* v. *Allen* itself was reversed by the Court of Appeal, although on another point.[19] This left the question open for consideration by that court in the *Di Ferdinando* case,[20] where it was in effect overruled.

(3) The earlier case of *Manners* v. *Pearson & Sons* [21] was decided by the Court of Appeal, and has never been overruled. That case was an equity action for account. The defendant had contracted to pay monthly certain amounts in Mexican currency. On November 13, 1897, pursuant to a decision of a court, an account was rendered showing that on August 31, 1896, there was due to the plaintiff 19,366 Mexican dollars. As between the defendant's contention that the rate of exchange prevailing on November 13 should be applied, and the plaintiff's contention that the rate prevailing on August 31 should be applied,[22] the court decided for the defendant on the ground that the amount could not have been paid on August 31, when no one then knew what the amount payable was, and the defendant could not be made liable for the delay in taking the account.

"If the plaintiff wanted to charge the defendants with damages in taking the account, he should have obtained some declaration or inquiry entitling him to such damages. Before the Judicature Acts, no one ever heard of investigating damages in taking an account in Chancery of money due under a contract. Since the Judicature Acts damages can be given in the Chancery Division where they could not have been given before; but even now a judgment or order for an account of what is due

Com. Cas. 63, but I think Mr. Schiller [counsel for plaintiff] has succeeded in convincing me that there is no inconsistency between the decision which I am now pronouncing and that decision. If he was wrong in so persuading me all I can say is that I prefer my present decision."

[18] *Supra,* footnote 9.

[19] (1920) 36 T. L. R. 245.

[20] This case was regarded as reversing the rule in *Kirsch* v. *Allen* by the House of Lords in *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, pp. 551, 564.

[21] [1898] 1 Ch. 581.

[22] The plaintiff at first urged the stronger contention, namely, that the value of the Mexican dollars should be ascertained at the several times at which the monthly payments were due under the contract. He later abandoned this point. That the plaintiff was right in his first contention seems clear from the able discussion in the dissenting opinion of Vaughan Williams, *L. J., supra,* footnote 21, pp. 591 *et seq.* He points to what should be a conclusive analogy in the case of an ordinary commodity. "Suppose the account had been an account of the number of bushels of maize which the defendants had received in Mexico on account of the plaintiff, the amount payable by the defendants to the plaintiff would have to be fixed according to the value of the maize at the date when the defendants ought to have accounted for the maize in question according to the course of business between themselves and their principal, and it seems to me that the Mexican dollar should be accounted for on the same footing. It may be that in the present case it might have been troublesome to ascertain the dates at which the various sums payable as commissions in dollars became payable; but this would not in my judgment have been a sufficient reason for fixing the amount of the result of the account in English sterling according to the value of the dollars at the date of the completion of the taking of the account. This difficulty, however, does not arise in the present case because the plaintiff is willing that the value shall

under a contract does not involve an inquiry as to damages in taking the account." [23]

Although decided by the Court of Appeal, the authority of this case on the point of substantive law involved is weakened by two factors. In the first place, it admittedly adopted a rule other than the breach date [24] because it was an equity action, and the majority thought that that made a difference. The court seemed to imply that the plaintiff might have a remedy at law ("he should have obtained some declaration or inquiry entitling him to such damages"). The decision, while seemingly inconsistent with the reasoning and rule of the *Di Ferdinando* case in the Court of Appeal, and the *Owners of S. S. Celia* case in the House of Lords, might possibly be distinguished on the ground that the plaintiff failed to pursue all his remedies. Even on that point the court erred in applying the substantive law, and the fact that the case was an equity action (which prior to the Judicature Acts might possibly have made a difference, procedurally) really had nothing to do with it.[25] Secondly, later judges have labored at great pains to explain away this decision. The problem was clearly recognized in the dissenting opinion,[26] and the able statement therein contained of the rule applicable generally to the rate of exchange is approved and made the basis of the opinion in the *Di Ferdinando* case and is likewise approved by the majority in the *Owners of S. S. Celia* case. In view of these two decisions, there would seem to be no doubt that if an account case like *Manners* v. *Pearson*

be taken of the dollars as on August 31st, 1896, the date as of which the defendants in fact rendered their account, including all the sums now claimed by the plaintiff."

[23] *Ibid.* 589, *per* Lindley, *M. R.*

[24] "It is at least remarkable that the actual date of the judgment [November 4, 1897—judgment that the account be delivered, which was done on November 13, 1897] was not suggested as the critical moment . . . This judgment clearly does not depend upon the view that the date of the judgment is the correct date for conversion, but rather upon the ground that the judgment is a judgment for something which is found due on taking the account, and that it is at the date when the account has been taken or delivered that the true liability is disclosed. In other words, the balance of the account is treated as the foundation of the claim for judgment and it is at that date that the conversion is to be made.

"I am not prepared to accept this view, but it is not essential to determine that question in the present case. It is sufficient to say that the judgment certainly did not proceed upon the ground for which the appellants now contend." *Per* Lord Buckmaster in *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, p. 550.

[25] *Cf.* the claim of the plaintiff in *Comstock* v. *Smith* (1870) 20 Mich. 338, which was apparently denied by the trial court, and no appeal taken by the plaintiff. If such an appeal had been taken, the claim evidently would have been allowed, under the authority of *Sheehan* v. *Dalrymple* (1869) 19 Mich. 239, approved in the later decision.

[26] *Supra,* footnote 21, p. 591. "It seems plain that this mode of computing the value of currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained at the appointed time and place, and, if this is so, it follows that the date as of which the value must be ascertained is the date of the breach, and not the date of the judgment. If this is the general rule in actions for the recovery in English courts of sums payable abroad in foreign currency, I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for account."

should again arise and come before the House of Lords, that case should and probably would be overruled, and the sound rule laid down that as to each item of the account, the rate prevailing at the time that item became due should be applied.

The early English cases are not of much help in solving the problem before us. The variations in the rate were quite slight, and the question was simply, who should pay the relatively small cost of remittance, representing the difference between the par value and the current (usually steady) rate of exchange. Today, this cost of remittance is not such an important factor due to our complete banking system, intimately connecting up all parts of the world, and facilitating our stupendous amount of international trade which affects nearly all countries.[27] Individuals or banks in one country have credits in other countries, continually being augmented and drawn upon in the course of payments for international transactions. "There is little authority upon the actual question until recent times, a circumstance due, no doubt, to the fact that fluctuations of currency did not formerly occur with the violent oscillations by which they have been marked in recent years." [28]

Likewise in the United States jurisdictions, we do not find many of the early cases of great assistance in the solution of this problem. Some of these concern themselves with the question of the par of exchange, and face the problem of deciding between it and the rate of exchange at the time of trial.

"The argument in favor of allowing the rate of exchange is that the

[27] See W. Lennox McNair, *Rate of Exchange in English Judgment* (1921) 37 Law Quarterly Rev. 38. For a long period of time the English pound sterling has been a stable factor in the exchange situation. "The rate of exchange between this country and the United States of America varied so slightly before the war that it never became necessary to decide this point, but since the war the position has entirely changed." *Barry* v. *Van den Hurk, supra,* footnote 8, p. 712. *Cf.* dissenting opinion in *Manners* v. *Pearson, supra,* footnote 21, p. 593; the following early English cases: *Auriol* v. *Thomas* (1787) 2 T. R. 52; *Mellish* v. *Simeon* (1794) 2 H. Bl. 378; *Pollard* v. *Herries* (1803) 3 Bos. & Pull. 335; *Cash* v. *Kennion* (1804) 11 Ves. Jr. 314; *De Tastet* v. *Baring* (1809) 11 East 265; *Cockerell* v. *Barber* (1810) 16 Ves. Jr. 461; *Landsdowne* v. *Landsdowne* (1820) 2 Bligh 60; *Pilkington* v. *Commissioners for Claims on France* (P. C. 1821) 2 Knapp 7, 19; *Campbell* v. *Graham* (1830) 1 Russ. & M. 453; *Delegal* v. *Naylor* (1831) 7 Bing. 460; *Scott* v. *Bevan, supra,* footnote 14; *Bertram* v. *Duhamel* (1838) 2 Moo. P. C. 212; *Suse* v. *Pompe* (1860) 8 C. B. (N. S.) 538; *Williams* v. *Ayres* (1877) L. R. 3 A. C. 133; *In re Commercial Bank of South Australia* (1877) L. R. 36 Ch. D. 522. See also the Canadian case of *Crawford* v. *Beard* (1864) 14 U. C. C. P. 87. McNair's article, *supra,* was reprinted in (1921) 41 Canadian Law Times 733, "as an introductory basis of a proposition which we intend to discuss and unfold in an early issue of CANADIAN LAW TIMES—namely, the obligation of a Canadian Mortgagor to pay Exchange value on his loan, or to pay in equivalent American money when the mortgaged land is in Canada, the money has been lent in Canada, and the Mortgagee Company has a registered office in Canada, but the place of repayment of the loan is the U. S. A., and the money is contracted to be paid there 'in gold or its equivalent.' What money? That is the question. There are multitudes of mortgages of this type in Canada.—B. T." (p. 733, Editor's note.) See *supra,* footnote 5, for a Scottish case.

[28] *Per* Lord Buckmaster in *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, p. 549.

plaintiff is entitled to have his money at the place agreed on. Against it, the reply is that the court can award only the debt due, and cannot inquire what the plaintiff intends to do with his money after he receives it, and cannot fix by its decree the day when he shall receive it." [29]

This problem was somewhat different from our present one, for often the rate of exchange did not fluctuate very widely from the par of exchange, in its economic sense, as used today,[30] and not at all with the suddenness which has characterized its movements since the war. The courts were mainly influenced by the desire to secure a convenient rule easy of application. In the leading early trial date case of *Hawes* v. *Woolcock*,[31] the court said:

"And in view of these uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of judgment, purchase the amount due on the note in the funds or currency in which it is payable."

Frequently, moreover, the rate of exchange at the time of default and at the time of trial did not vary much, although both might at times vary considerably from an existing statutory ratio which was also called "par." [32] Statutes providing for such ratios, statutes regulating the damages in actions on foreign bills of exchange, early statutes making foreign currency legal tender, and other statutes are found construed in the cases to give results different from those naturally expected. Some of these cases choosing the rate of exchange at the time of trial rather than the par of exchange were really based on reasoning somewhat similar to that behind the breach day rule. What the defendant suffered as a result of the plaintiff's breach was the loss of a foreign credit, which was valued in the United States markets according to the relatively stable rate of exchange, whatever that might be, and without regard to the fixed par of exchange. Hence, the courts assessed damages according to the rate of exchange, taking for convenience the rate prevailing at the trial. That amount more approximately corresponded to what the plaintiff lost on the date of breach than the amount figured according to the statutory or even economic par of exchange. Today, however, it is improbable that any court would apply the par in computing damages.

Many of the American cases deal with the problems arising from

---

[29] *Per* Judge Lowell, in *Reiser* v. *Parker* (C. C. D. Mass. 1868) Fed. Cas. No. 11,685, p. 511 (decided before Supreme Court rule of entering judgments in gold).

[30] Also called the "mint par." Formerly this was called the *commercial* or real par. This must not be confused with an arbitrary ratio fixed by statute, which may or may not be the same as the commercial or real par. See *infra*, p. 248, for a discussion of the par of exchange and the "gold points."

[31] (1870) 26 Wis. 629, 636.

[32] Or nominal par. On the relation between the statutory and commercial par, *cf.* however, *Albert* v. *Citizens' Bank* (1850) 5 La. Ann. 720.

the legal tender laws and depreciated currency in this country. Not only did these affect domestic transactions, but they had equally important consequences on international transactions. Gold was at a premium, like an ordinary commodity, and the rate of exchange on foreign countries was far above the true par, the difference representing such premium. According to the political and other conditions affecting the value of the paper currency, the rate of exchange expressed in that currency would vary considerably. An important question was whether the foreign currency should be computed on the basis of that rate of exchange or the value of American gold currency, which latter was more stable and would give a much smaller sum.[33] A number of cases, also, deal with inland bills of exchange and other transactions involving domestic "exchange," especially during our early banking history. While here foreign currency is not involved, we do sometimes have the same question as that presented by the current cases. But in none of the cases in the above groups or arising under peculiar conditions in our economic and financial history is extended consideration given to whether the rate of exchange at the time of breach rather than at the time of judgment is the correct measure to be adopted in the problem before us.

There cannot, therefore, be said to be any American rule on the present subject, as has been stated.[34] Yet we do find that cases in a few jurisdictions have come to be cited for some definite rule and have apparently started different lines of authority,[35] some, without much consideration of the question, favoring the judgment date rule,[36] and others, especially the more recent cases, tending to adopt the breach date rule.[37]

---

[33] ". . . the difference in value between gold and United States currency is in no proper sense a difference in exchange." *Rice* v. *Ontario Steamboat Co.* (N. Y. 1868) 56 Barb. 384, 388.

[34] That is, the *judgment* day rule. See (1921) 34 Harvard Law Rev. 422; (1921) 31 Yale Law Journ. 198; (1921) 19 Michigan Law Rev. 652, 653. In England, through the influence of Story's works, *Marburg* v. *Marburg* (1866) 26 Md. 8, has often been cited as representing the American rule. See *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, pp. 546 (by counsel), 552, 557, and 569; *Di Ferdinando* v. *Simon, Smits & Co., supra,* footnote 1, p. 410 (by counsel), and p. 412; *Lebeaupin* v. *Crispin, supra,* footnote 9, p. 723; *Barry* v. *Van den Hurk, supra,* footnote 8, p. 710 (by counsel). And it should be noted that some of the early American cases have been influenced by a misinterpretation of *Scott* v. *Bevan, supra,* footnote 14. *Cf. Marburg* v. *Marburg, supra,* and the works of Story and other text writers.

[35] For a discussion of the New York rule, see *infra,* p. 229; and of the rule of the Federal Courts see *infra,* p. 227. *Cf. Blanton* v. *Luckett* (1804) Ky. Dec. 307 (no variance where damages laid in pounds in declaration and judgment given for dollars).

[36] *Marburg* v. *Marburg, supra,* footnote 34; *cf., contra, Rasst* v. *Morris* (1919) 135 Md. 243, 108 Atl. 787; *Taan* v. *Le Gaux* (Pa. 1793) 1 Yeates 204; *Lee* v. *Wilcocks* (Pa. 1819) 5 Serg. & Rawle 48; *Scott* v. *Hornsby* (Va. 1797) 1 Call 41; *Hawes* v. *Woolcock, supra,* footnote 31, p. 635.

[37] *Grunwald* v. *Freese* (1893) 4 Cal. Unrep. 182, 34 Pac. 73; *Warnock* v. *Fleming* (1916) 200 Ill. App. 22; *Simonoff* v. *Granite City Nat. Bank* (1917) 279 Ill. 248, 116 N. E. 636; *cf. American Express Co.* v. *Cosmopolitan Trust Co.* (Mass. 1921) 132 N. E. 26 (statute); *Comstock* v. *Smith, supra,* footnote 25 (*semble*); *Sheehan* v. *Dalrymple, supra,* footnote 25 (*semble*); *Katcher* v. *American Express Co.* (1920) 94 N. J. L. 165, 109 Atl. 741, *rev'g* (1918) 92 N. J. L. 309, 105 Atl. 497. See also *infra,* footnote 91. *Cf. Pfeil* v. *Higby* (1866) 21 Wis. 248; *Butler* v.

The Supreme Court of the United States [38] has given us no authoritative decision on our problem. The Circuit Court of Appeals for the Fifth Circuit seems to deny the judgment date rule.[39] The question has recently arisen and been considerably discussed in two District Courts.[40] The District Court for the Eastern District of Pennsylvania faced it in the following spirit: [41]

"This controversy suggests many academically interesting questions and raises some of great practical importance. . . .

"The history of any such transaction discloses several different dates, beginning with the date of the promise and including that of maturity, demand, action brought, and the date of trial. The adjudged cases deal with transactions which are unlike in some features. These unlike features may affect the place of payment; a promise expressed in our own or a foreign money of account, or other points of difference. There are at least hints of distinction based upon the form and nature of the promise in respect to whether it takes the form of a promissory note or the acceptance of a bill of exchange. There are cases also, of a promise to pay in a currency which is what is called depreciated at the time of the making of the promise, or is such at a later date. There are also cases which are sui generis, such as the Confederate money cases.

"The English cases must be read with the thought in mind that they are considered from the viewpoint of the fixed idea of the absolute stability of the pound sterling, and that it is an unvarying standard of value. . . .

"The Pennsylvania cases supply us with a very meager discussion

---

Merchant (Tex. Civ. App. 1894) 27 S. W. 193; *Mathews* v. *Rucker* (1874) 41 Tex. 636; *Adams* v. *Cordis* (Mass. 1829) 8 Pick. 260; *Blanchard* v. *Equitable Safety Insurance Co.* (Mass. 1866) 12 Allen 386, 390; *Nickerson* v. *Soesman* (1867) 98 Mass. 364.

[38] As to federal legislation, see *infra,* footnotes 95 and 98. *Cf. Birge-Forbes Co.* v. *Heye* (C. C. A. 1918) 248 Fed. 636, cert. granted (1918) 246 U. S. 676, 38 Sup. Ct. 426, *aff'd* (1920) 251 U. S. 317, 325, 40 Sup. Ct. 160 (in absence of any evidence of value of marks at time of payment, par should be taken).

[39] *Wormser Bros.* v. *Marroquin & Co.* (1918) 249 Fed. 428, 430. This was a suit by the seller on a contract for the sale of corn for a price fixed in Mexican currency. *Held,* the seller could not be charged with having received $500 in United States money, since a Mexican dollar *at the time of deposit* was worth only 44 cents in United States currency, and so the seller could be properly charged with only $220.

[40] See, as to the Eastern District of Pennsylvania, *infra,* footnote 42; and as to the Southern District of New York, *infra,* footnotes 43 and 45. The District Court for the District of Oregon *without any discussion,* or objection from counsel, applied the judgment day rule in an admiralty action for refusal to carry all the lumber agreed to be carried. The "damages have been ascertained at Bombay—one item, of £1,075 sterling, and another of 4,550 rupees." *The Saignon Maru* (1920) 267 Fed. 881, *aff'd* on appeal on other grounds (C. C. A. 9th Cir. 1921) and rehearing denied (1921) 272 Fed. 799. *Cf. Price* v. *Teal* (C. C. D. Ind. 1847) Fed. Cas No. 11,417, where a domestic note was payable with rate of exchange and it was held that the rate on the due date rather than on the trial date should be applied. And *cf. Marstelier* v. *Faw* (C. C. D. C. 1803) Fed. Cas. No. 9,137, *rev'd* (U. S. 1804) 2 Cranch 10.

[41] *Liberty Nat. Bank of N. Y.* v. *Burr, supra,* footnote 1, p. 252. This action was one at law in assumpsit, and the question came up on a rule for judgment for want of a sufficient affidavit of defense. Suit was on a bill of exchange drawn and accepted in London and made payable there in pounds sterling. *Held,* leave for the plaintiff to move for judgment in a sum based on the rate of exchange prevailing at the time judgment is entered, etc.

of the principles on which the rulings may rest. Lee v. Wilcocks, 5 Serg. & R. (Pa.) 48, is ruled on the ipse dixit of Chief Justice Gibson that, in cases of promise to pay in foreign money, it was the settled rule to base a finding of the sum recovered upon the rate of exchange prevailing at the trial. . . .

"Counsel have cited a number of other cases ruled in different jurisdictions. These we have had no opportunity to examine. There would seem, however, to be a lack of uniformity among them. We are, in consequence, taken back to Lee v. Wilcocks as the only light judicially shed upon the question. It is to be regretted that we have no statement from Chief Justice Gibson of the principle upon what the [*sic*] terms the 'settled rule' is based. . . . "

After discussing four possible principles, ". . . we follow the rule laid down in Lee v. Wilcocks, which we accept as the established rule in Pennsylvania. It meets the test applied in some of the cases in other jurisdictions that the amount of the judgment entered should be the equivalent of what the plaintiff would recover, if the suit were brought in the jurisdiction in which the obligation was assumed and in which it was payable. . . ." [42]

Justice Augustus N. Hand, in the District Court for the Southern District of New York, in two decisions handed down the same day drew a distinction in applying the rule. In *The Verdi*,[43] an admiralty suit between two British subjects for damages for collision in waters off the United States, the amount of repairs and expenses had been stated in British currency. Because the collision happened within the jurisdiction of the court, the damages were payable here, and the mode adopted by the parties was a mere method of arriving at the amount of damages suffered by the collision at New York, ". . . and then and there payable when ascertained." The court held the amount to which the plaintiff was entitled on January 1, 1916 was the number of dollars represented by £8269 at the then rate of exchange, *i. e.*, the date when the amount of the damages was ascertainable.[44] Moreover the "somewhat

[42] *Accord,* see *Smith* v. *Shaw* (C. C. D. Pa. 1808) Fed. Cas. No. 13,107; *Cropper* v. *Nelson* (C. C. D. Pa. 1811) Fed. Cas. No. 3,417; *contra,* see *Woodhull* v. *Wagner* (C. C. D. Pa. 1831) Fed. Cas. No. 17,975; *The Weatherby* (D. C. E. D. Pa. 1891) 48 Fed. 734.

[43] (D. C. 1920) 268 Fed. 908. See comment on this case in (1921) 19 Michigan Law Rev. 652. The court also cites, as in accord with its conclusion, the unreported decision of Judge Learned Hand, in *Constantinidi* v. *Benas* (D. C. S. D. N. Y. Jan. 19, 1920). *Accord,* see *Forbes* v. *Murray* (D. C. S. D. N. Y. 1869) Fed. Cas. No. 4,928 (the sum of £163.44 was due in New York on June 21, 1864, as freight money. Judge Blatchford said there could be recovery for what "the specified amount of British coin was worth in New York, in gold and silver coined money of the United States, on the 21st of June, 1864," to be so expressed.); *Hus* v. *Kempf* (D. C. S. D. N. Y. 1879) Fed. Cas. No. 6,944 (freight payable "at the current rate of exchange for banker's sight bills on London"—*held,* amount payable not to be calculated in gold), and see s. c. Fed. Cas. No. 6,943. *Cf. The Cabot* (D. C. S. D. N. Y. 1848) Fed. Cas. No. 2,277 (as to voluntary payments made abroad).

[44] Suppose the collision had occurred outside of the jurisdiction of the court, for instance, in British waters or on the high seas, and the repairs had been paid for in English pounds on January 1, 1916, what rate would the court apply? Would this be "a case of pounds sterling due in England, suit to recover which is brought in New York," so that the rate on the judgment date would be applied?

archaic argument" that the damages could not be determined until the final decree because this was a *tort,* was emphatically rejected.

However, in *The Hurona,*[45] where advances to the amount of 119,007.65 francs were made to the master of a ship in France, the same court held that the plaintiff was entitled to a decree for "119,007.65 francs converted at the rate of exchange prevailing at the date of entering the decree." The distinction drawn by the court in these two cases seems to be this: in both cases the plaintiff was entitled to damages, *i. e.,* indemnification. If the damages are payable *here,* even though expressed by the parties in foreign currency, they are payable in dollars at the rate prevailing when the damages were ascertainable. That gives the plaintiff complete indemnity, since had the currency been paid on the date of the damages, they would have been worth so many dollars to the plaintiff. Such a case is different from one where the damages are payable in a foreign country in the currency of that country. Here the plaintiff is indemnified only if he gets that amount of foreign currency in the foreign country;

> ". . . so long as this is performed, and that number of francs, plus interest, is paid to the libelant, its claims are fully satisfied, and it is completely indemnified. This is, therefore, purely a case of transmitting funds, from one country to another, and of rendering a decree which will enable the libelant to have the amount of money *in francs* which was due to it *in France* on the 12th day of July, 1919."[46]

The judgment date rule, applied in *The Hurona* to the case of a loan in France, was also approved in *Sirie* v. *Godfrey,*[47] involving simply

The tone of the opinion seems to lead to this result, as in *The Hurona, supra,* footnote 16, but there would seem to be no valid reason for such a decision.

[45] *Ibid.* 911. Here was an obligation to pay a liquidated sum in francs in France (a debt on a note) and the court applied the trial date. This is *contra* to the reasoning behind the re-exchange rule as to bills of exchange. See *infra,* p. 233.

[46] *Ibid.* 911 (italics the writer's). It should be noted that the court relied upon some rather weak authority in drawing its conclusion. *Kirsch* v. *Allen* is no longer law in England, see *supra,* p. 221. The dicta of Mr. Justice Story in *Grant* v. *Healey* (C. C. D. Mass. 1839) Fed. Cas. No. 5,696, and of Mr. Justice Washington in *Smith* v. *Shaw, supra,* footnote 42, are not very helpful. The other decision was the early case of *Hawes* v. *Woolcock, supra,* footnote 31.

In *Grant* v. *Healey, supra,* the suit was on a balance of an account in foreign currency (pounds sterling) payable in the United States; the court held the amount of the judgment was to be determined at the par of exchange, not at the rate of exchange. Today no court would apply the par of exchange in such a case; the only question is as to the *date* of the *rate* of exchange which is applied. At the date of that case, 1839, while the European money market was disturbed, there had been no wide and sudden fluctuation in the rate of exchange. A par of exchange had been fixed by United States statutes, and there seemed to be another par of exchange fixed by commercial usage. The "interesting discussion" by Mr. Justice Story does not throw much light on the present problem.

[47] (1st Dept. 1921) 196 App. Div. 529, 188 N. Y. Supp. 52. This was an appeal by the plaintiff from a judgment at Trial Term dismissing the complaint, upon the grounds: (1) that there was only "a simple contract for the purchase of goods made in France upon an open running account between the plaintiff and the defendant, said goods to be delivered by the plaintiff to the defendant in France and the United States, and to be paid for in French currency at

a sale of gowns in France. The actual decision in that case, however, was based upon two grounds: (1) ". . . at most the plaintiff was entitled to recover in American money the equivalent of the French francs stipulated in the contract at the rate of exchange prevailing at the time of the rendition of judgment. . . . It was payable in French francs, and by merely bringing action in this jurisdiction, the plaintiff, I apprehend, acquired no right to a more favorable judgment than she could have obtained had action been brought in France."[48] (2) The delivery of the drafts did not comply with the statutory rules of tender under § 731 or § 732 of the Code of Civil Procedure.

On the first point, however, the court did not adopt the reasoning of the federal court in *The Hurona* (where there was a loan in France), namely, that here was simply a case of "transmitting funds." Strangely enough, the New York court said the sale of goods in France was not a case of transmitting funds, and so the date of breach rule should not be applied, though it was adopted in the earlier case of *Gross* v. *Mendel,*[49] where the defendant was the acceptor of a bill of exchange for 7,000 marks payable in Germany. Said the court, in attempting to distinguish that case,

". . . the procedure involved in the *Mendel* case seems to me no less than a transmission of money from this country to Germany, accomplished

Paris, France, and that the dollar and its face value had nothing to do with the transaction" (p. 536); (2) full payment had been made by delivery of two drafts for 10,450 francs—the agreed price, and (3) the plaintiff had waived any right to consider such delivery of the drafts as inadequate tender. The Appellate Division, in a unanimous opinion, *per* Judge Merrell, held that judgment must be reversed and a new trial ordered unless the parties would stipulate the equivalent in American money of 10,450 francs, as of the time of *trial.* (p. 539. *Cf.* use of word "judgment" on p. 536 in enunciating the rule. The use of different terms is confusing.)

[48] *Ibid.* 537. The discussion as to the rate of exchange is really mere dictum in the case, as the insufficient tender alone would necessitate a reversal so that the plaintiff could recover. As to the amount of recovery, it is submitted that the judgment day rule stated by the court in the first ground of its opinion is incorrect and contrary to the rule laid down by Judge McLaughlin in *Gross* v. *Mendel* (1st Dept. 1916) 171 App. Div. 237, 157 N. Y. Supp. 357, (motion denied) 1127, *aff'd* without opinion (1918) 225 N. Y. 633, 121 N. E. 871, and enunciated in the well-considered opinions by the Court of Appeals in *Pavenstedt* v. *N. Y. Life Insurance Co.* (1911) 203 N. Y. 91, 96 N. E. 104, *aff'g* (1906) 113 App. Div. 866, 99 N. Y. Supp. 614, and answering question certified (1907) 119 App. Div. 865, 104 N. Y. Supp. 1135. See especially the concurring opinion of Chief Judge Cullen, pp. 103, 104. At the date of this article (December 1st, 1921) the *Sirie* case was on the calendar for retrial.

Cf.. The English case of *Barry* v. *Van den Hurk, supra,* footnote 8, a suit against the buyer for damages for failure to take the goods, where the breach day rule was applied. This case differs in fact from the *Sirie* case only in that there the goods had been delivered but not paid for, but the principles applicable are similar. See *supra,* footnotes 13, 14 and 64.

[49] In this case, *supra,* footnote 48, p. 240, the plaintiff drew bills of exchange upon a London drawee, payable in German marks at Leipzig. The bills were accepted and dishonored. Upon suit brought in New York, it was held that the plaintiffs could "recover here in United States money an amount which, at the time of the respective defaults, would have purchased what the defendants agreed to pay, together with the interest and protest fees." See comment on this case in the Appellate Division in (1916) 29 Harvard Law Rev. 873.

through the instrumentality of the said bills of exchange, and when said bills became due the defendants not having marks in readiness at Leipzig to meet them, it was incumbent upon the plaintiff to procure the necessary marks to meet the said bills of exchange which they had drawn, and they were allowed to recover a sum of money sufficient to procure the same upon the dates when they fell due. The situation in the case at bar is entirely different. This is not the exchange of money, but the payment for goods purchased and sold through a medium of exchange, namely, French francs, specified in the contract. The plaintiff might have brought action immediately upon the sale and delivery for the purchase price of said goods, and could have recovered of the defendant at that time the equivalent of the 10,450 francs in American money at the then prevailing rate of exchange. Having delayed in bringing her suit, she was only entitled to recover that for which she sold the goods at the rate of exchange prevailing at the time of recovery." [50]

In rendering this decision, the court did not consider two important decisions which preceded it and denied the judgment date rule. In *Revillon* v. *Demme*,[51] a peculiar rule was laid down which, however, was based on the reasoning behind the breach day test. In a suit in this country on notes executed in France in payment of shares of a French corporation and payable in France on August 4, 1915 in French currency, the court said this was a case

". . . . of a common debt contracted and payable in France.

"It seems to me that the rule as to the measure of damages which should be applied in such case is, pay the creditor the exact sum which he ought to have received in France."

In applying this rule, the court considered both the par rate (*sic*) of exchange and the rate of exchange at the date of trial and entry of judgment, which the parties by stipulation agreed upon as November 16, 1920; and after entirely ignoring the rate of exchange at the date of maturity of the notes, August 4, 1915, which was one of the four dates submitted to the court by the stipulation,[52] the court adopted the rate of exchange at the date of the commencement of the action in New York (May 21, 1920) because the "notes became payable in dollars upon plaintiff's demanding of defendant their payment in this state." [53] In

[50] *Supra*, footnote 47, p. 538. For comment on this case see, *supra*, p. 219. In this case, the plaintiff relied on *Martin* v. *Franklin*, *infra*, footnote 57, and contended only for "the standard Federal rate, or par of exchange," rather than "the rate on cost of exchange upon the purchase of a banker's cheque on Paris." (p. 5 of Brief, in Case and Exceptions, 1921, App. Div. 1st Dept., 81 Cases & Pts., Case No. 513, N. Y. Co. L. Ass. ed.)

[51] (2d Dept. Sp. T. 1920) 114 Misc. 1, 3, 185 N. Y. Supp. 443; for comment see (1921) 19 Michigan Law Rev. 652.

[52] *Ibid.* 2. It would seem that this was the proper date to apply, if the court were to follow the rule approved by the Court of Appeals in *Gross* v. *Mendel*, *supra*, footnotes 48 and 49, and *Pavenstedt* v. *N. Y. Life Insurance Co.*, *supra*, footnote 48, and *infra*, footnote 55.

[53] *Revillon* v. *Demme*, *supra*, footnote 51, p. 5.

other words, the true date of the rate of exchange was the date of breach in this state, but not the date of judgment.[54]

That the New York Court of Appeals will also deny the judgment date rule and probably adopt the breach day rule seems fairly certain, both from the unanimous affirmance of *Gross* v. *Mendel* and from the unanimous decision in the case of *Pavenstedt* v. *N. Y. Life Insurance Company*.[55] The whole problem is anticipated by Chief Judge Cullen, who says:

"In this case there is no complaint of any loss by appreciation in Colombian money after defendant's failure to pay the draft, the only way in which damage by fluctuations in value could occur. It is doubtful whether such a claim if made, could be sustained, as there are decisions to the effect that where default is made in payment of foreign money, recovery in our money is to be computed on the basis of the relative values of the two currencies at the time of default." [56]

And this result may be expected without consideration of the early New York cases.[57]

Such a rule will bring New York in line with the conclusion reached in England and indicated in the better considered recent cases. Moreover, the statement of Chief Judge Cullen in favor of the breach date rule seems to be in accord with the practice of merchants and consistent

---

[54] "The facts of the case furnish no occasion for discussion of conflict of laws, or the laws governing bills of exchange, or the laws or customs of merchants." *Ibid.* 3. The court also said that generally the *lex loci contractus*, and not the *lex fori*, governs questions as to the elements and amount of damages recoverable for breach of contract; and that in the case before it, in the absence of contrary evidence, the law of France would be presumed to be similar to that of New York.

[55] *Supra*, footnote 48. This was an appeal from an order reversing an interlocutory judgment overruling a demurrer to the complaint. The suit was for damages for failure to accept or pay a bill of exchange drawn by the defendant upon itself in New York for $4,181.60, payable in New York to the plaintiff's assignor. The payee had indorsed and sold it to a bank in Colombia for $234,169.60 in Colombian money, and upon the defendant's default the payee had to make good to the bank by providing $4,181.60 American money at a cost to him of $376,344 in Colombian money (the dollar had in the meantime appreciated in value, rising from $56 in Colombian money to $96 in Colombian money). The plaintiff therefore demanded the difference between $4,181.60 and $5,785.18 in American money, which difference the payee had to pay out by reason of the defendant's default. (The defendant had already paid over $4,181.60.)

[56] *Supra*, footnote 48, p. 105.

[57] In *Revillon* v. *Demme, supra*, footnote 51, the court distinguished and refused to give extended consideration to *Martin* v. *Franklin* (N. Y. 1809) 4 Johns. 124 (assumpsit for goods sold and delivered and *insimul computassent—par* of exchange, though general practice among merchants to pay current rate of exchange) and the other cases in which that decision has been followed. *Cf. Robinson* v. *Hall* (N. Y. 1864) 28 How. Pr. 342, 345; *Oliver Lee & Co.'s Bank* v. *Walbridge* (1859) 19 N. Y. 134, 135; *Graves* v. *Dash* (N. Y. 1814) 12 Johns. 17; *United States* v. *Barker* (C. C. D. N. Y. 1816) Fed. Cas. No. 14,517, p. 994. *Guaranty Trust Co.* v. *Meer* (1921) 114 Misc. 327, 187 N. Y. Supp. 288, was a contract to sell francs, "check on Paris," in New York. There was an anticipatory breach, and the contract date for performance was applied rather than the date on which the buyer repudiated his contract. *Cf. Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.* (1916) 172 App. Div. 16, 157 N. Y. Supp. 955.

with the principles generally applied in the law of damages. Let us consider these principles and some analogous situations.[58]

(1) *Re-exchange.* Light is thrown on the problem before us by an examination of the doctrine of re-exchange.[59] Suppose a merchant in New York draws a bill of exchange for a number of pounds sterling payable in London, and the bill is dishonored at maturity. By the custom of merchants of all nations, the holder of the dishonored bill in London has a right to draw at once on the drawer[60] in New York for as much United States currency as will buy the number of pounds sterling called for by the bill at the rate of exchange at the date of dishonor,[61] and he has of course the right to include in the amount of the bill the interest and necessary expenses of the transaction. While it is true that this right to redraw is seldom exercised, the right is recognized when suit is brought and in computing the damages the foreign currency is converted into United States currency at the rate of exchange prevailing at the date of dishonor of the bill—not the judgment date of the suit or any other date.[62]

This principle was recognized in a case which arose after the legal tender legislation in the Civil War period. The plaintiff had purchased a bill of exchange for £2500 on one Benjamin Thornton of London, paying therefor $11,600 in gold. After acceptance and protest for non-payment, suit was brought against the drawer in this country, and the trial court ruled that the amounts of recovery were to be computed in gold, rather than in currency, which would have given the plaintiff a judgment 40% greater. The majority of the Supreme Court of the District of Columbia reversed this ruling on the ground that,

---

[58] This conclusion seems to be universally agreed upon by present writers on the subject. See (1920) 20 Columbia Law Rev. 914 and 922; (1916) 29 Harvard Law Rev. 873; (1921) 34 Harvard Law Rev. 422, 435; (1921) 31 Yale Law Journ. 198; (1921) 19 Michigan Law Rev. 652; (1921) 5 Minnesota Law Rev. 146; W. Lennox McNair, *loc. cit.* *Contra,* (1920) 68 Univ. of Pennsylvania Law Rev. 395.

[59] See *The Bank of the United States* v. *United States* (U. S. 1844) 2 How. 711, 737; *Oliver Lee & Co.'s Bank* v. *Walbridge, supra,* footnote 57; *Pavenstedt* v. *N. Y. Life Insurance Co., supra,* footnote 48, p. 95; *Simonoff* v. *Granite City Nat. Bank, supra,* footnote 37, p. 254.

This subject is also treated in 2 Sedgwick, *Damages* (9th ed. 1912) §§ 700, 701; 4 *ibid.* § 1375; Byles, *Bills and Notes* (Wood ed. 1905) 418; Story, *Bills* (4th ed. 1860) §§ 398, 400; Story, *Conflicts* (8th ed. 1883) 308 ff; Daniel, *Negotiable Instruments* (6th ed. 1913) § 1445; 3 Kent's Comm. *115; Randolph, *Commercial Paper* (2d ed. 1899) § 1714; Tiedeman, *Bills and Notes* (1898) § 407; 2 Halsbury, *Laws of England* (1908) 525.

[60] The rights of the holder against the acceptor may be different.

[61] *Suse* v. *Pomp, supra,* footnote 27. The rule of this case is adopted by the English Bills of Exchange Act (1882) § 57 (2). See also *ibid.* § 72 (4) for a similar rule as to bills drawn abroad but payable in the United Kingdom in foreign currency. And see cases *supra,* footnote 27; *Grimshaw* v. *Bender* (Mass. 1809) 6 Tyng 157; *Barclay* v. *Minchin* (Mass. 1809) 6 Tyng 162; *Greene* v. *Goddard* (Mass. 1845) 9 Metc. 212.

[62] May this not have been on the theory of specific performance? Since the court could not give the specific article, it gave the nearest relief—an equivalent amount in currency of the jurisdiction.

"The bill must be held at its value in London at the time it was presented. . . .

"This bill of exchange was an article of merchandise, and certainly it could not be bought at $4.44 per pound sterling. The error below was in regarding this as a mere money transaction, when in fact it was the purchase of a merchantable article." [63]

(2) *General rules of damages.* In all these cases the defendant has committed a wrong and a "right" has been created in the plaintiff to damages. The purpose of the judgment in an action is to assess in terms of money, the loss, whether incurred at the time of the breach of duty or as a result of it, for which the defendant is responsible. Aside from punitive damages, money damages generally are awarded as compensation for the injury suffered by the defendant, to put him in as good a position economically as he would have been if he had not been wronged by the plaintiff. However, this general doctrine has some well known exceptions. Thus in contract, the defendant is not liable for consequences of his act which the plaintiff could reasonably have avoided. In tort, the defendant is often not liable for consequences of his act which he could not have reasonably foreseen. There is a whole body of learning in our law on the questions of avoidable consequence and of remote damages, for which a defendant is not responsible. In the case of contract, for instance, a contract to sell wheat, where the seller defaults, the principle of indemnification is applied on the assumption, based on common business practice, that upon the defendant's breach the plaintiff-buyer will at once buy in goods in the market as a substitute for those not delivered by the seller. The difference between the price he pays in the market and the price agreed upon in the contract represents the real loss caused by the breach of the obligation. And so we are led to accept as the measure of damages the market price of the goods on the date of breach by the defendant.[64] If the value of the wheat increases thereafter, the plaintiff cannot recover that increase in value—such damages are "too remote." Likewise if the wheat decreases in value after default, the defendant buyer cannot offset that decrease in value.[65] There seems no good reason for treating the case of dam-

[63] *Schuehardt* v. *Thornton* (D. C. 1868) 6 Sup. D. C. 294, 295.

[64] *Rodocanachi* v. *Milburn* (Ct. of Ap. 1886) 18 Q. B. D. 67; *Wertheim* v. *Chicoutimi Pulp Co.* (P. C. 1910) [1911] A. C. 301, 307; *William Bros.* v. *Ed. T. Agius, Ltd.* (H. L.) [1914] A. C. 510; *Slater* v. *Hoyle & Smith* (Ct. of Ap. 1919) [1920] 2 K. B. 11; English Sale of Goods Act (1893) § 51 (3); American Uniform Sales Act § 67 (3). See (1920) 20 Columbia Law Rev. 914.

The suggestion has been made that the choice between the breach day rule and the trial day rule depends in theory on whether the right to damages is substituted for the debt or whether the debt continues and is recovered. (1916) 29 Harvard Law Rev. 873. Though there may be a historical distinction here due to the difference in theory between the common law forms of action, (1) debt and (2) assumpsit or action on the case, there can be no such distinction today where the breach of an ordinary obligation, whether tort or contract, is compensated by damages.

[65] This analogy of a commodity to foreign currency is recognized by the courts. *Pavenstedt* v. *N. Y. Life Insurance Co.*, *supra*, footnote 48, p. 104; *Gross* v. *Mendel*, *supra*, footnote 48, p. 240; *Hawes* v. *Woolcock*, *supra*, footnote 31,

ages for breach of an obligation to deliver foreign currency any differently from the case of damages for breach of an obligation to deliver wheat. Looking at the situation realistically the foreign money here must be treated for all practical purposes as a commodity. If a party has failed to pay a certain amount of foreign currency when due, the party not at fault can go out in the market and buy in an equal amount of foreign currency at the rate then prevailing. He should not be allowed to charge the defendant with any subsequent increase in the value of the foreign currency through a rise in the rate of exchange, and likewise, he should not suffer by any subsequent decrease of the value of the foreign currency through a fall in the rate of exchange.

As in the case of contract, so in the case of tort, the same principles should apply. Accordingly, the date selected may be either the date the cause of action arose in the case of "unliquidated" damages only, or the date prior to trial at which any particular item of damage became liquidated as to that item.[66] The tort problem may become quite complicated, as foreseen in the *Owners of S. S. Celia* case, where a ship while under a contract of hire, was injured in a collision. "If there had been prospective or continuing damage the matter would have been more complicated, but I do not think that the principle would have been affected."[67] As to the case of unliquidated damages, Lord Sumner ventures the sound dictum:

"If the damages were such as need not be repaired at all, the whole loss might have been measured by the immediate depreciation of the ship in consequence of the collision. . . . In that case there would either be no question of exchange, if the evidence of sound and damaged values could be given in sterling, or if there was any conversion into sterling, it would have been calculated at the rate current at the time of *the collision*."[68]

The argument of uniformity is a strong one in support of such a rule. This rule was applied in the *Di Ferdinando* case, which was reported as an action for breach of contract to carry goods and conversion of those goods. So in a case of conversion, for taking a horse on January 1, 1922 in London, worth £100 on that date, the proper rate to apply would be the rate prevailing on January 1, 1922. The same principle seems applicable to a tort for personal injuries, where there might be

pp. 635-36; *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, pp. 548, 561, 562; *Di Ferdinando* v. *Simon, Smits & Co., supra,* footnote 1, p. 414; dissenting opinion in *Manners* v. *Pearson, supra,* footnote 21, p. 592, and footnote 22; see also 1 Sedgwick, *op. cit.* 538; but *cf. Grant* v. *Healey, supra,* footnote 46, p. 980, where Mr. Justice Story seems to have overlooked this point.

[66] See *The Verdi, supra,* footnote 43, where the damages were liquidated by the payment for repairs made to the damaged ship. The rule applying the date of such payment was also approved in *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, p. 554. For a comment on the peculiar date selected in that case, see *supra,* the same footnote.

[67] *Supra,* footnote 10, p. 553.

[68] *Ibid.* 554. (Italics are the writer's.)

several items of damage, some liquidated in foreign currency, for instance doctors' bills, and some not liquidated. The right to compensation would be complete on the date of the personal injury, "though it might take time to discover all the consequences and to establish the extent of the mischief. That compensation was not recoverable in any particular currency, and, although for convenience of proof it would be severable into divers heads and items, it would be one gross sum, recoverable once for all." [69]

Two general arguments have been urged in favor of the judgment day rule in the case of torts. In the first place, it has been said,

". . . in an action of tort, damages are not ascertained until they have been assessed, and that if, in the interval between the tortious act which has occasioned the damage, and the ascertainment of its amount, there has been an alteration in the rate of exchange, the party injured will, instead of receiving the amount due to him as compensation, receive a greater or less amount, dependent on whether the rate of exchange has fluctuated favourably or adversely to his interest." [70]

This has been denied by the Southern New York Federal District Court [71] and also by the English House of Lords,[72] because the damages from the alteration in the rate are altogether too remote, and, moreover, that is a thing which is not at all connected with the wrongful act of the defendant, but is common generally to all financial transactions between two or more countries. In the second place, it has been argued "that the defendant is bound by a pecuniary payment to put the plaintiff in a position as good as that in which he stood before the tort was committed." [73] To this Lord Wrenbury has replied:

"That is true, but it is necessary to add the consideration of which we have recently heard so much, in the form of a fourth dimension—namely, that of time. . . . If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment . . . another and a subsequent wrongful act." [74]

Both in contract and in tort the alteration in the rate of exchange should not affect the damages since that is too remote a factor. Only this difference is possible: in contract, the parties may perhaps expressly agree to make the alteration in the rate of exchange after the breach of contract, an element in damages for the breach, but in tort, this is not possible. ". . . in the absence of any such agreement the same con-

[69] *Ibid.* 553. [70] *Ibid.* 559.
[71] See *The Verdi, supra,* p. 228.
[72] *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, pp. 558-60.
[73] *Ibid.* 563. Practically the same argument has been made in contract cases, see *infra,* p. 237 and p. 238. It seems to be the basis of the statements of Lord Eldon, *infra,* p. 238, and Justice Scudder, *supra,* p. 231.
[74] *Ibid.* 553.

siderations would be applicable whether the action is based on tort or on contract." [75]

While it may seem clear on the analogy to commodity cases that the breach day rule is the sound one in the case of a bill of exchange or of breach of contract for damages, which usually results from an international commercial transaction, a difficulty in adopting this rule may be felt in a case where the plaintiff's right arises out of what may be said to be a "national" transaction,[76] for instance, a sale and delivery of goods in France as in the *Sirie* case, or a loan in France as in *The Hurona,* or perhaps a guaranty of a mortgage debt due in France. In such cases, it may be said, that since the plaintiff wanted francs for use in France and would have received them if the defendant had performed his obligation, the judgment should put the plaintiff in the same position as if the defendant had performed. This seems to have been the theory behind the decisions in the *Sirie* case and *The Hurona,* and may be applied to the guaranty case as follows: If D has guaranteed to pay a mortgage debt of 10,000 francs in France and is sued in the United States, really all P wants is the 10,000 francs, and the only way to give him that is to apply the rate of exchange at the judgment date. Then P can get his 10,000 francs, and D's obligation is discharged.

The difficulty with this, just as with the decisions in the *Sirie* case and in *The Hurona,* is that the plaintiff is not expected either in theory or in practice to apply the particular sum of money recovered in a United States court to the purchase of foreign currency in order to perform the original obligation. If P wishes to, he may do that; but he may do anything else he pleases with the dollars recovered. The amount of the recovery in a judgment is never determined by what P may do with the actual money recovered. It is true that the principle of indemnification in contracts to sell is based on a general custom in fact for business men to cover themselves. But that assumption is made in every case of marketable goods by the courts (on the principle of avoidable consequence) even though in the particular case before it, the party has not covered,—because there is such a custom in fact. But there is no general custom for plaintiffs who recover money on a judgment to apply that particular money, or any other money *later,* to securing the performance which the defendant promised. In fact, the element of time is the essential factor here, for if the plaintiff applied any of his money at all for that purpose, it is properly assumed that it was so applied at the time when the defendant should have performed, namely the breach day.

This assumption is not open to the objection of unfairness or violation of business practice. (1) If the plaintiff in fact did buy such

[75] *Ibid.* 561. See *Hussey* v. *Farlow* (Mass. 1864) 9 Allen 263, 265; *Turnbull* v. *Watkins* (1876) 2 Mo. App. 235; and *cf. Albert* v. *Citizens' Bank, supra,* footnote 32.

[76] *Cf.* "purely home business" in E. E. Agger, *Organized Banking* (1918) 124.

foreign currency with currency of the forum on the breach day in order to cover himself, then of course he is not injured by the application of the breach day rule. (2) However, if the plaintiff's only way to cover himself is to buy the foreign currency with currency of the forum, and he has in fact neglected to do so on the breach date, he should not be allowed to charge the defendant with the result of such neglect if this foreign currency has appreciated; nor should the defendant benefit by the fortuitous circumstance if the foreign money has depreciated. (3) Finally when we have the case where the plaintiff is not compelled to buy the foreign currency at all to cover himself, it is submitted that the breach day rule is nevertheless the better one to apply, on the ground of uniformity. After all the vast majority of transactions where foreign currency is involved are in fact international in character, as witnessed by the great bulk of importations and exportations of goods, international loans of money and credit, insurance, freight charges and other services. The "national" transactions suggested are restricted to business done by tourists, and local transactions in shipping, etc. Moreover, it seems obvious that in both classes of cases the plaintiff's motive and intention in making the contract originally were to secure the foreign currency, or what for all practical purposes is the same thing, the credit in foreign currency. When, therefore, the plaintiff seeks a judgment which will entitle him to currency of the forum (for instance, United States dollars), the amount of that judgment should not vary according to whether the plaintiff became entitled to the foreign currency upon a sale of goods in France or upon a purchase of a bill of exchange for the foreign currency in the United States. In both cases, the object of the judgment sought in the United States is to secure *dollars*.

The difficulty suggested above in the case of a national transaction may likewise be felt in a case arising from an international transaction. The judgment day rule has found support in the oft-cited dictum of Lord Eldon in *Cash* v. *Kennion*: [77]

> "I cannot bring myself to doubt, that, where a man agrees to pay 100*l*. in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed. The contrary principle would be most dangerous to Irish mortgages."

However, this generalization really avoids the issue here presented, which is, *as of what date* should the rate of exchange be taken to com-

[77] *Supra*, footnote 27, p. 315. This case merely decided that the expense of a commission payable to an agent for remitting money on a debt contracted in Jamaica but payable in London must be borne by the debtor rather than the creditor. While this dictum has been cited for the judgment date rule, it can also be used for the breach day rule, as in *Grunwald* v. *Freese, supra*, footnote 37, p. 76; see also the generalization of Justice Scudder, in *Revillon* v. *Demme, supra*, p. 231.

pute the damages in the currency of the forum. What Lord Eldon says of foreign currency is equally true of wheat to be delivered in a foreign country—if the seller fails to deliver and the price of wheat then rises, we do not assess him with that subsequent rise in the price of wheat. In rejecting the rate of exchange (at the time of suit, evidently), the court in *Martin* v. *Franklin* said:

". . . the courts are not to inquire into the disposition of the debt, after it reaches the hands of the agent. He may remit the debt to his principal abroad, in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the *United States,* or to other countries, on the same account. We cannot trace the disposition which is to take place, subsequent to the recovery, nor award special damages upon such uncertain calculations. All that the plaintiffs can ask, is their debt, justly liquidated and paid in the lawful currency of the *United States.*" [78]

In all cases where money damages are awarded on the theory of compensation, there is a fundamental difficulty, which cases like *Sirie* v. *Godfrey* bring out very clearly. Let us consider a case where only one currency is involved, for instance a loan of money in France between two Frenchmen, 500 francs due January 1, 1914. Judgment is recovered on January 1, 1920 for 500 francs. Is the plaintiff in as good a position after receiving 500 francs in 1920, as he would have been had he received them in 1914? If he wanted to put the money into a bank, and would have done the same in 1914, he is perhaps as well off, as in either case he would have merely a credit for 500 francs. But if he wished to buy shoes or other goods or services with the 500 francs, clearly he is not as well off, as he could get much less of these things in 1920 than he could have gotten in 1914 with 500 francs. In other words, money itself fluctuates in value; but this is not a factor which courts of law ordinarily take into account, for reasons of convenience. It is desirable to have some pecuniary standard; and in France the standard is the franc, just as in the United States it is the dollar. In the *Sirie* case, the court was really going one step further than applying the dollar pecuniary standard, which an American court usually does, and in effect attempting to apply a sort of franc-pecuniary standard, by giving the defendant enough dollars to produce 10,450 francs on the date of judgment. Why the court should depart from the usual pecuniary standard in such a case is difficult to see. In doing so, the court was, perhaps, really going further than it thought, in departing from the theory of compensatory damages. If that doctrine were followed, the

[78] *Supra,* footnote 57, p. 125. The nature of this problem is not yet clearly recognized by the digest writers. The recent cases are found in the *American Digest* under the following "key numbers"; "Banks and Banking" 188½, 189, 317, "Bills and Notes" 529, 531, "Payment" 12 (5), "Sales" 190, 384½, "Shipping" 58 (3); and in Mews *English Case Law Digest* under "Contracts," "Sale of Goods," "Shipping"; also in Scott's *Digest* under "War." They seldom list these cases also under their proper head, "Damages."

10,450 francs which the plaintiff could get with the dollars recovered would not put him in as good a position economically as he would have been had the defendant paid them when due; for francs themselves were not worth as much, and would buy less goods in France and elsewhere.

In one sense, the adoption of either the judgment date rate of exchange, in accordance with the franc-pecuniary standard in the *Sirie* case, or the breach date rate is the result of an arbitrary choice. The most that can be said for the former date is that it is perhaps more in accord with the literal words of the general rule of compensatory damages, usually stated by the courts in other cases. On the other hand, that rule is itself subject to exceptions for various reasons of fairness and policy. And if the adoption of the breach day rule in the case of a sale or loan, etc., in France must be regarded as an exception to that general rule, it should be so regarded. To do so would mean the application of the same dollar-pecuniary standard in all cases of damages in American courts, and the same reasons of convenience lying behind such a standard in other cases exist in cases like *Sirie* v. *Godfrey*. Moreover, there will be a uniform rule as to the rate of exchange in all cases, whether sales in France, bills of exchange and other contract agreements payable in France, or torts. And this rule will be the same whether the rate has fallen, or has risen.

In the *Sirie* case, the court looked with disfavor on the breach day rule, as that would have given the plaintiff a larger judgment.

"The plaintiff might have brought suit immediately upon the sale and delivery for the purchase price of said goods, and could have recovered of the defendant at that time the equivalent of the 10,450 francs in American money at the then prevailing rate of exchange. Having delayed in bringing her suit, she was only entitled to recover that for which she sold the goods at the rate of exchange prevailing at the time of the recovery."

In the *Sirie* case, the franc had depreciated so that the plaintiff would have benefited as to the number of dollars recovered in the judgment; but if the franc had appreciated, under the rule of that case, the plaintiff "having delayed in bringing her suit" could have recovered many more dollars than the francs were worth on the date the price was due. It would be possible to avoid this result by drawing a distinction based on whether the rate of exchange has fallen or risen; and if it has risen, awarding a judgment according to the rate on the date of breach. But this would indeed be a curious result, in effect applying the distinction so as to benefit the defendant in each case, though he had committed a wrong. It is true there is a historical distinction between the theory of damages in tort and contract, which would seem to justify ignoring the benefit to the defendant in a contract case, like *Sirie* v. *Godfrey*,

so long as the plaintiff was made whole. But it is submitted that the question of benefit is of no consequence here. Whichever rule is adopted, in some cases the plaintiff will benefit and in others the defendant will benefit; and the other considerations discussed above and about to be taken up would seem to make desirable the adoption of the breach day rule.

(3) *Inherent limitations of courts.* An interesting problem in connection with the above principles of damages has been suggested by Mr. Justice Story in *Grant* v. *Healey*.[79] He puts the case of an obligation to pay abroad, not foreign currency, but currency of the country in which suit is brought.

"Suppose a man undertakes to pay another $10,000 in China and violates his contract, and then he is sued therefor in Boston, when the money, if duly paid in China, would be worth at the very moment 20 per cent. more than it is in Boston; what compensation is it to the creditor to pay him the $10,000 at the par [*sic*] in Boston?"

It should be noted at once that "$10,000 at the par in Boston" is rather a confusing expression, as the par of exchange is never involved where we are dealing with but one currency; but only where there are two currencies, each on gold basis.[80] While at first blush, it does seem unfair to the creditor to allow him only $10,000, suppose the money in China would have been worth 20% less. Should the creditor then recover less than $10,000? It seems desirable to have a uniform rule for all cases. Or again suppose the $10,000 were compared not to Chinese money but to wheat in China, and the $10,000 could buy 20% more wheat in China at the time of trial than at the time the money should have been paid. Does that entitle the plaintiff in the United States to a judgment for more than $10,000? If the promise is to pay United States dollars and the court can award a judgment in United States dollars, there seems to be no good reason why it should not be for the amount expressed in the obligation. And it has been so held.[81] If the *place* is to be considered at all, then the rate on that place applicable

[79] *Supra,* footnote 46, p. 980.

[80] See *infra,* p. 248, and footnote 98.

[81] *Lodge* v. *Spooner* (Mass. 1857) 8 Gray 166 (contract for passage money—$1800—agreed to be paid in Canton, China). *Cf. Jelison* v. *Lee* (C. C. D. Mass. 1847) Fed. Cas. No. 7,256; *Hussey* v. *Farlow, supra,* footnote 75; *The Rochambeau* (D. C. D. Me. 1864) Fed. Cas. No. 11,973, mod. by *Trecartin* v. *The Rochambeau* (C. C. D. Me. 1865) Fed. Cas. No. 14,163. *Cf.* N. Y., Laws 1819, p. 34 (now repealed): " . . . and the amount of such [foreign] bill, and of the damages payable thereon, as above specified, if the contents of said bill be stated or expressed in the currency or money of account of the United States, to be ascertained and determined without any reference to the rate of exchange existing at the time of such notice and demand of payment as aforesaid." For the rule where the amount is expressed in foreign currency, see *Gross* v. *Mendel, supra,* footnotes 48 and 49. *Cf.* also the English Bills of Exchange Act (1882) § 57 (2): ". . . in the case of a bill which has been dishonored abroad, in lieu of the above damages (*i. e.,* amount of the bill, interest, expenses of noting and protest) the holder may recover from the drawer or an indorser the amount of the re-exchange with interest until the time of payment."

should at the most be the rate on the date prevailing at the time the obligation is due rather than the date at the trial or judgment date, as implied by Story. If the rate on the breach day is applied so as to convert the sum due into the currency of the place where it is due, then and only then have we the problem with which we are concerned, and should properly apply the breach day rate again to re-convert the sum due into the currency of the forum in which the judgment must be rendered. To do otherwise, the court would be applying two different rates, and it is difficult to see on what ground the court could do this. Judge Livingston frowned upon a similar double conversion suggestion in stating:

"To say because bills are selling for depreciated paper not recognized as a legal currency at one hundred per cent. advance, that twice the amount of the bill shall be recovered to enable the plaintiff in such an action to buy another bill of the same amount with the first, and then to compel the defendant to pay that sum in specie, which will buy a bill of more than double the amount of the one protested, is a course of proceeding not entitled to much favour." [82]

It should be noted, however, that Story's criticism is directed not to any particular rate of exchange as distinguished from some other rate of exchange, but to the rate of exchange as against the par of exchange.

It is believed that the courts should not, in the absence of express agreement, recognize a change in value of the money standard of the forum due to *place* differences, for the same reason it does not do so in the case of *time* differences, namely, convenience. Two cases may arise. If domestic money is desired abroad to be used later only in the country of the forum, for the purchase of goods, services, securities, etc., clearly no injustice is done by this rule. If, however, it is wanted abroad for use there to purchase goods, services, securities, etc., it will normally be converted into the foreign currency before such purchasing (and if a bank draft, then at the prevailing rate of exchange). Assume that standard coin is to be paid, and that the defendant breaches his obligation when the foreign currency is appreciated in value. The plaintiff may have to buy the foreign currency or its equivalent; or if he has some already, he may have to use up more of it than he would have if the defendant had not defaulted and the coin could have been exchanged at the mint. In such a case, the plaintiff may be said to be damaged to the amount of the foreign currency he could have secured if the payment of the money of the forum had been made on the due date. Then our problem would arise and it would be necessary to determine as of what date to apply the rate of exchange to convert that amount of foreign currency into currency of the forum. The sound rule would seem to be, for the reasons discussed, the rate on the date the obligation should have been paid.

[82] *United States* v *Barker, supra,* footnote 57, p. 994.

However, even in the latter case, no account should be taken of the change in value of the currency of the forum (in terms of the foreign currency) unless there is an *express agreement* to that effect, as in the case of inland obligations, where exchange is not payable unless expressly agreed upon. The only difference between Story's case and the case of an inland obligation is that in the former there are two kinds of currency and in the latter only one. But no distinction is warranted on this basis, as in such cases it is not normally within the contemplation of the parties to pay "exchange" or actual coin. There is no intrinsic reason why a court could not adopt the rule that exchange or coin must be paid in these cases; but in line with the general policy of our law to give effect to the agreements of parties where no special reason prevents, the courts should properly apply the usual currency of the forum standard of value. Thus on an obligation to pay $10,000 without more the damages in an American court would always be $10,000 (with interest of course), irrespective of when or where the money should have been paid.

While our problem does not arise with an obligation to pay currency of the forum abroad, it does present itself where the obligation is to pay foreign currency, whether abroad or in the forum. The reason for this is quite obvious. Courts under our nationalistic system of economy and law, by their inherent limitations, common both to courts of law and courts of equity,[83] do not award a judgment for damages in currency other than that of the country in which they have jurisdiction. Aside from that they can apply the ordinary rules of damages. Where the evidence shows the damages in foreign currency, therefore, and some rate of exchange must be selected to convert the sum due into currency of the forum, it seems natural that the rate should be selected as of the date or dates with reference to which the damages or various items of damages are ascertainable, according to the general law of damages. Mr. Justice McCardie sums up the situation as follows:

"To hold otherwise would produce extraordinary results. The damages payable would depend partly on the date when the plaintiff issued his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the Court, and partly on whether the judge reserved his decision or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the Court of Appeal or by the House of

[83] *Cf.* principle of *Howe* v. *Nickerson* (1867) 96 Mass. 400 (award in gold dollars), overruled by United States Supreme Court according to *Stark* v. *Coffin* (1870) 105 Mass. 328; and of *Wilson* v. *Morgan* (N. Y. 1866) 30 How. Pr. 386, 395 (freight payable in silver or gold dollars), likewise overruled; *Willard* v. *Tayloe* (U. S. 1869) 8 Wall. 557 (equity decree of specific performance of agreement to convey premises upon payment of price in gold and silver coin, although paper money had been made legal tender).

See *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, pp. 553, 560; *Di Ferdinando* v. *Simon, Smits & Co., supra,* footnote 1, pp. 412, 415; *Barry* v. *Van den Hurk, supra,* footnote 8, p. 712.

Lords. Such a state of things would, I think, be most unsatisfactory." [84]

The rule believed to be correct is not only logical and fair for the reasons above discussed, but is definite, general and uniform. It avoids any discussion based on the advantages or disadvantages to the parties in particular cases, as to the many possible dates which might be selected. The test of the true date cannot be that date which will benefit the plaintiff. It is immaterial whether the plaintiff or defendant will benefit.[85] Where risks are remote we do not always throw them upon the defendant in particular cases. The fluctuation in the rate of exchange is common to all money or credit transactions between countries. It is inevitable, where this problem is presented, that one party or the other will be affected by a fluctuation in the rate, unless it is the same at the time of judgment as at the time of breach. If we could have a system of jurisprudence where a party could get relief on the same day as the breach of obligation, no problem like this would arise. But as things are constituted today "the Courts do not take any account of the necessary delay which must occur before a case is brought to trial." [86]

While the courts cannot take account of the "necessary delay which must occur before a case is brought to trial" and judgment, they should take account of the unnecessary delay which may result from the adoption of the judgment day rule. "Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays." [87] Moreover, should that rule be adopted, if there is a steadily rising rate of exchange, the plaintiff may purposely delay in starting a suit and in securing a judgment in order to secure it at the time when the rate will be most favorable to him. In other words, he is enabled to speculate at the expense of the defendant by "jockeying" to secure the time of trial and judgment most favorable to his position.[88] "It would encourage a plaintiff to hasten or postpone

---

[84] *Lebeaupin* v. *Crispin, supra,* footnote 9, p. 722.

[85] *Cf.* the leading trial date case of *Hawes* v. *Woolcock, supra,* footnote 31, pp. 635-36 (giving the fluctuation in the rate as a reason for its rule), with *Lebeaupin* v. *Crispin, supra,* footnote 9, p. 722 (giving the same reason for the breach day rule), and with what must be regarded as a leading breach day case, *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, p. 549. In *Lebeaupin* v. *Crispin,* the pound sterling had depreciated (as compared with the United States dollar), so that the plaintiff would have benefited by the trial date rule; while in *Di Ferdinando* v. *Simon, Smits & Co., supra,* footnote 1, the pound sterling had appreciated (as compared with the lira), so that the plaintiff would not have benefited by the trial date rule. Yet in both cases, the breach day rule was adopted. The suggestion has been made that the defendant should be penalized by paying interest for "unnecessary delay in making payment." *Barry* v. *Van den Hurk, supra,* footnote 8, p. 713. It is very doubtful whether this suggestion will be adopted. *Di Ferdinando* v. *Simon, Smits & Co., supra.*

[86] *Barry* v. *Van den Hurk, supra,* footnote 8, p. 713; *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, p. 563.

[87] *Owners of S. S. Celia* v. *Owners of S. S. Volturno, supra,* footnote 10, p. 558.

[88] See *Lebeaupin* v. *Crispin, supra,* footnote 9, p. 723; (1920) 20 Columbia Law Rev. 914.

the trial according to his view of the money market, and he might gamble on the rate of exchange." Likewise, the defendant, though he may not control the commencement of an action, yet on a falling market, will have a motive for delaying the course of action, which in practice he may be able to do to a considerable extent.

The argument may suggest itself that a plaintiff would wish to "jockey" a suit along only if he were interested in getting the maximum amount of currency of the forum; but that if he really wanted the foreign currency, he would always be treated fairly only if the judgment day rule were applied, as that would give him the exact amount of foreign currency called for in the obligation. If such were the plaintiff's purpose, and the breach day rule were applied, it may be said that then the plaintiff is really enabled to "jockey" or speculate anyhow, in order to get as much foreign currency as possible; for he will wait till it has depreciated as far as he thinks it will go, and will then secure a judgment. For instance, suppose D breaches an obligation to pay 2000 francs on a guaranty of a debt, and at the time of breach they were worth $100. Francs depreciate, thereafter, so that on the date P can recover a judgment in New York, $100 will buy 3000 francs. Since on our assumption, P really wants the francs, if he recovers $100 under the breach day rule, he will be able to get, not the 2000 francs due under the obligation, but 3000 francs. It would be to P's interest, therefore, to postpone suit as long as he could (before the statute of limitations had run) while the franc was depreciating.

While it is true in the case supposed that by the application of the breach day rule, P is able to get more francs on the date of judgment than called for in the obligation, it is not true that this is because P has postponed suit in accordance with his desire to speculate on the rate of exchange at the expense of the defendant. It would be just as easy to speculate on the rate of exchange, if P secured a judgment at once and put the money in a bank here. He could keep it there while the franc was depreciating, and buy francs whenever he chose. So P would not have any interest in postponing suit while the rate of exchange was falling, even though he really wanted francs. Moreover, the above argument against the breach day rule is very similar to that urged in the case of the "national" transactions discussed above. The chief difficulty with such a contention is in the assumption,—that the plaintiff brings his suit in New York in order to get francs. It is true that the obligation was payable in francs, but a suit for damages brought in New York has for its object the securing, not of francs or of any other foreign currency, but only of dollars. What P's motive in making the contract was, or what his intention in making the contract was, cannot alter the fact that his object and intention in bringing suit in New York was to secure payment of damages in dollars. And to determine how many dol-

lars he can recover, we look to the rate of exchange on francs prevailing on the date with reference to which the damages are ascertainable—normally, the date of breach of the obligation. If we select that date, the damages are fixed at an amount which has the same relative value all over the world, and whether suit is brought in New York, or London, or Rome, the plaintiff will recover the damages as ascertained on the date of breach of the obligation. The same principle applies to any damages liquidated at a later date, for which the defendant is properly chargeable under the law of damages.

(4) *Reasonable time rule.* While the date of breach seems a sound date to apply generally, there seems to be some weight to the rule urged on the basis of the analogy[89] of foreign currency to personal property of continually fluctuating value in the market. It has been held, for instance, that the measure of damages where shares of stock are involved is the highest value which the stock reached within a reasonable time after the wrong occurred.[90] So the rate of exchange selected in our problem might be the highest rate which existed within a reasonable time after the wrong occurred,[91] for the same reasons which lie behind the stock rule. However, in dealing with currencies, it would seem desirable to select a definite and easily ascertainable date from which to compute the damages. The rule may be arbitrary in this respect, but it is convenient and easy to apply, and makes unnecessary the determination of that often difficult question as to what is a reasonable time.

(5) *"Transmission of funds"*[92]*—the economic and practical operation.* That a federal court will adopt the judgment day rule where there has been a loan of francs in France on the ground that it is "purely a case of transmitting funds," while a New York court will adopt the same rule where there has been a sale and delivery of goods for a price in francs in France on the ground that it is *not* a case of transmission of funds, as is the case of a bill of exchange, would lead one to inquire just what is really involved in such transmission of funds. Such an

[89] See *Ladd* v. *Arkell* (N. Y. 1875) 8 Jones & Spencer 150, 159; (1916) 29 Harvard Law Rev. 873.

[90] *Baker* v. *Drake* (1873) 53 N. Y. 211, 2d appeal (1876) 66 N. Y. 518; *Galligher* v. *Jones* (1889) 129 U. S. 193, 9 Sup. Ct. 335; *Dimock* v. *U. S. Nat. Bank* (1893) 55 N. J. L. 296, 25 Atl. 926. Not only has this rule been adopted in the case of commercial securities like stocks and bonds, but it is also applied to other objects of fluctuating value, like produce. *Page* v. *Fowler* (1870) 39 Cal. 412.

[91] *Cf.* the rule stated in *Katcher* v. *American Exp. Co., supra,* footnote 37, and in *Oshinsky* v. *Taylor* (1918) 172 N. Y. Supp. 23.

[92] *Cf.* Stone, *Some Legal Problems Involved in the Transmission of Funds* (1921) 21 COLUMBIA LAW REV. 507. The general discussion applicable to foreign bills, notes, and other debts is not entirely applicable to similar domestic obligations, although the rule as to the rate of exchange, where involved, would seem to be the same. See *Oliver Lee & Co.'s Bank* v. *Walbridge* (1859) 19 N. Y. 134, 137 (no rate of exchange between cities in same state). *Balch* v. *Colman* (C. C. D. Ind. 1840) Fed. Cas. 791 (rate on due date of note to be established by evidence); *Price* v. *Teal* (C. C. D. Ind. 1847) Fed. Cas. No. 11,417 (note payable with rate of exchange—*held,* rate to be applied as of due date rather than trial date).

inquiry may aid us further in determining whether the Appellate Division in *Sirie* v. *Godfrey* was justified in departing from what seemed to be the established New York rule. It seems quite apparent that the problem before us may become quite confused by distinctions attempted on the basis of "transmission of funds." To say that in one case we are dealing with transmission of funds and in another we are not, gets us nowhere. Either we are dealing with transmission of funds in all cases or we are dealing with it in no case. As a matter of fact, "transmission of funds" is apt to become here one of "those lighthouses throwing out darkness" which may quickly lead us on the rock of confusion. We must realize that we are really facing a problem of damages, best solvable along the lines of the familiar usage of merchants and the general rules of damages, with our eye always on the need for simple and easily applicable practical rules. We can be helped in doing this by a knowledge of the actual operation of the rate of exchange, and in understanding what is involved directly and indirectly in transmission of funds, so that we need not also become mystified by that wordy term "rate of exchange."

Suppose A in New York owes B in London £100, due January 1, 1923. As a matter of fact how does A meet his obligation on January 1? He does not go around on the market in New York and buy up £100, either gold sovereigns or other legal English pounds, and send them by ship to his creditor in London. Of course, A might search the market and probably could ultimately find 100 gold sovereigns and ship them across the ocean to be in London on January 1, but in practice we know he does not do that. What he does do is to go to a banker and buy from him a bill of exchange drawn on some English bank or commercial house for £100, and he pays for this in United States money at the rate of exchange prevailing when he buys.[93] This bill of exchange, A sends to his creditor B in London in payment,—in this way really "transmitting funds,"—a credit. Then in the ordinary course of banking operations B gets a credit and the drawee of the bill pays that credit, or has it deducted from his bank account, at the same time debiting a like amount against the drawer bank in New York. The reason this is possible is because the New York bank has a credit in pounds on a London bank or house. How are such credits established? Ordinarily, they arise out of international commercial transactions. A New York merchant ships cotton to a London merchant and if the price has been fixed in pounds, the New York merchant draws on the London merchant for so many pounds payable to the seller. The New York merchant then sells this bill (usually after acceptance) to a New York bank which forwards it to its correspondent bank in London and through the normal clearing house operations in London, the London merchant has his account debited for the face of the bill and the same amount stands to

[93] See dissenting opinion in *Manners* v. *Pearson*, *supra*, footnote 21, p. 592.

the credit of the New York bank on the books of the London bank. In normal times, the supply and demand of such bills of exchange, arising out of commercial and banking transactions, determines the "rate of exchange," *i. e.*, the price paid for foreign currency—really a credit.[94] This is what determines what an individual in a particular transaction has to pay for a credit in foreign currency, which he wants in order to transmit funds for the purpose of discharging an obligation or creating one.

How then does transmission of actual foreign currency come in at all? Merely in this way. International balances of trade, as determined by a large number of particular transactions, are settled as a matter of fact in gold, considered as a commodity, and this is true even if the contents of the gold shipment are standard coins of the national currency.[95] As soon as a country's exports or imports overbalance each other enough, the rate of exchange will vary so much from par[96] that a shipment of gold will result and drive the rate the other way. For instance, suppose the United States were importing (mainly from England) more goods than they were exporting. The demand for foreign bills of exchange payable in English pounds would be greatly increased in the foreign exchange market of the United States, and the rate of exchange on pounds would increase. If it increases enough, it will then be cheaper for a debtor here actually to get gold dollars, pay the cost of freight, insurance, etc., necessary actually to ship them to England,[97]

[94] See *Murphy* v. *Kastner* (1892) 50 N. J. Eq. 214, 220, 24 Atl. 564. The abnormal situation resulting from the past war is due to the great excess of exportations of goods by the United States over importations of goods, and the cornering of most of the world's gold supply in the United States, together with the depreciated currency in foreign countries, also effected by the lack of an adequate gold reserve and an oversupply of paper money. See *The Wall Street Journal*, Jan. 5, 1921; *cf.* (1918) 40 Stat. 966, U. S. Comp. Stat. (Supp. 1919) § 6537(a), on stabilization of foreign exchanges, during the war and for the two years after its termination.

[95] Gold is "a common standard for value throughout the world." See *Fabbri* v. *Kalbfleisch, supra,* footnote 11, p. 31. While money units may be kept at a definite gold value, that does not mean that gold is the actual medium of exchange. "International trade is carried on today not in terms of gold but in terms of money units." Payment may be made by bullion shipment or a process of clearing involving either "commercial bills" or "bankers' bills." E. E. Agger, *op. cit.* pp. 124, 125 *et seq.*

[96] Many statutes have been passed affecting the "par of exchange." See the concise note in *Murphy* v. *Kastner, supra,* footnote 94, p. 220, citing Linder, *Legal Tender* 15-30, 60; W. G. Sumner, *History of American Currency* (1874) 103, 112. *Cf.* (1873) 17 Stat. 602, 603, U. S. Comp. Stat. (1916) §§ 6536-40. § 6537 was "An Act to establish the Custom-house Value of the Sovereign or Pound sterling of Great Britain, and to fix the Par of Exchange." It fixes it at $4.8665 and makes it applicable "in the construction of contracts payable in sovereigns or pounds sterling." This statute, as well as Rev. Stat. § 2903, were repealed, and Act of Aug. 27, 1894, § 25 was amended by Act of May 27, 1921, § 403, making the statutory rule applicable to collections of duties on importations only. Subd. (c) is of especial interest.

[97] The gold can be taken to the mint and made into foreign coins. The seigniorage charges where they are made do not affect the principles above noted. It should be noted that the present discussion in no way prevents a bill or note made payable in foreign currency from being in form a commercial instrument.

and there they can effect payment at the par of exchange. This par of exchange is simply the ratio between the number of grains in one standard gold coin (United States dollar) and those in the other (English sovereign).[98]

However, as we have seen, our debtor who owes pounds in London does not ordinarily ship to London enough gold to purchase pounds to pay his debt, but effects payment by means of a bill of exchange, often bought from a bank or other dealer, but also possibly drawn against a credit of his own existing in London. This is true whether he borrows pounds in London,[99] or whether he buys gowns in London payable in pounds,[100] or whether he assumes an obligation by acceptance of a bill of exchange to have pounds in London.[101] In all these cases, the "transmission of funds" is simply a transfer of credit; and the value of that credit at any particular time is determined by the commonplace market value of such a credit. Foreign credits have a market just like commodities or stocks and bonds. The evidence sufficient to establish such a value may be the testimony of *one* witness as to the price he paid for a bill of exchange on the date of breach.[102]

While the examination of the above principles and analogies seems to lead to but one conclusion on the issue before us, the state of the authorities is not at all settled, as we have seen. It is submitted that the question is essentially one of the law of damages and should be decided in accordance with the principles of that branch of the law. The general rule, therefore, in converting the amount of foreign currency found due to the plaintiff into currency of the forum, should be to apply the rate of exchange prevailing at the date with reference to which the damages are ascertainable[103] whether the action be in con-

This question is considered in two recent articles: H. Oliphant, *The Theory of Money in the Law of Commercial Instruments* (1920) 29 Yale Law Journ. 606, esp. 619; R. M. Perkins, *May a Promissory Note Be Payable in Foreign Money?* (1920) 5 Iowa Law Bull. 209. It is quite true for the purpose thus discussed that foreign currency is not a commodity. *Cf. Thompson* v. *Sloan* (N. Y. 1840) 23 Wend. 71 (note made in Buffalo and payable in "Canada money" is not a negotiable note under the statute); *Hebblethwaite* v. *Flint* (1918) 185 App. Div. 249, 254, 173 N. Y. Supp. 81.

See also Fraenkel, *Some Aspects of the Law Relating to Foreign Exchange* (1920) 20 Columbia Law Rev. 832, dealing with the forms of various transactions in foreign exchange. The statement is made that foreign currency here is a commodity.

98 The par of exchange is of consequence only where the two countries are on a gold basis. The normal variations sufficient to cause a gold shipment occur above or below "the gold points."

99 See *The Hurona, supra,* footnote 16.

100 See *Sirie* v. *Godfrey, supra,* footnote 47.

101 See *Gross* v. *Mendel, supra,* footnote 48.

102 See *Butt* v. *Hoge* (N. Y. 1858) 2 Hilt. 81. The rate (at the time of payment on a domestic note) is "to be established by evidence, the same as the value of any other thing." *Balch* v. *Colman, supra,* footnote 92; *cf. McLean* v. *Lafayette Bank* (C. C. D. Ohio 1846) Fed. Cas. No. 8,888, (1848) Fed. Cas. No. 8,889, *aff'd* (U. S. 1851) 13 How. 151; *Bond* v. *Grace* (C. C. D. C. 1802) Fed. Cas. No. 1,622, citing *Mahon* v. *Grace's Ex'rs,* Fed. Cas. 8,967 (under Virginia statute).

103 To summarize, it may be said that there is no valid distinction as to the

tract[104] or in tort.[105] Ordinarily, this date will be the date of breach of a contract obligation, whether for a liquidated or an unliquidated amount, or in the case of tort the date the cause of action arose, or, as to any particular item of damage, the date on which that item became liquidated.

It is not at all surprising that the authorities are not found in accord on this problem. The question is too new and much law may be expected to be made on the subject. The English view seems to have crystallized in favor of the above general rule, except possibly in an action on a negotiable instrument and in an equity account action. The question has come up in only a few United States jurisdictions, and in those where it has come up, the state of the authorities is such that one is hesitant to venture a prediction as to what the rule will be. However, that the sound view will be adopted, seems to be indicated in Illinois and the federal Circuit Court of Appeals for the Fifth Circuit. While the judgment day rule is stated in some early cases, it is unfortunate that the federal District Courts for the Eastern District of Pennsylvania, the Southern District of New York, and the District of Oregon have given that rule new life in deciding the present problem. It may be expected that the early cases will not be relied upon, except to support a view adopted for reasons other than those considered in those early cases, which generally use language much broader than was required by the cases themselves, and inappropriate to the present question. In New York, which has naturally been faced with the question sooner than other states, the court of last resort seems to lean toward the breach day rule. While the late Appellate Division case of *Sirie* v. *Godfrey* approves the judgment day rule in the case of a sale of goods abroad, it is hoped that the element of confusion thus introduced will be eliminated should that case reach the Court of Appeals.

EDWARD GLUCK

NEW YORK CITY

principles to be applied between a sum due in foreign currency (1) here or abroad; (2) as a debt or damages; (3) on a liquidated or unliquidated demand; (4) on a bill of exchange or any other obligation.

[104] This may, for instance, be either the date of maturity of an obligation to pay a liquidated sum, or the date for performance of an obligation to deliver goods under a contract of sale or carriage. Where money is deposited for transmission to a foreign country, and the obligation is not performed, the "buyer of the foreign exchange" may ordinarily recover the value of the foreign currency at the time he demands a refund from the seller. *Fliker* v. *State Bank* (1916) 94 Misc. 609, 159 N. Y. Supp. 730; *Gelfand* v. *State Bank* (1918) 172 N. Y. Supp. 99; *cf. Sommer* v. *Taylor* (1920) 190 N. Y. Supp. 153. Or if no demand is made, the value at a reasonable time after the seller should have made a refund. See *supra*, footnote 91.

[105] See *supra*, p. 235.